



UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 17th day of August, 2007

Application of

VIRGIN AMERICA INC.

for a certificate of public convenience and necessity
under 49 U.S.C. § 41102 to engage in interstate
scheduled air transportation of persons, property, and
mail

Docket OST-2005-23307

Application of

VIRGIN AMERICA INC.

for a waiver of the provisions of 14 CFR § 201.5

Docket OST-2007-28673

**ORDER CONFIRMING ORAL ACTIONS AND
ISSUING EFFECTIVE CERTIFICATE**

Summary

By this order, we (1) confirm our oral action of July 11, 2007, granting Virgin America Inc. ("Virgin America") a waiver of section 201.5 of our rules (14 CFR § 201.5) in order to permit it to issue tickets and accept payment from prospective passengers prior to receiving effective authority from the Department, (2) confirm our oral action of August 7, 2007, making the interstate scheduled passenger certificate issued to Virgin America effective on that date, and (3) reissue the air carrier's certificate to reflect its effective date.¹

Background

By Order 2007-5-11, issued May 18, 2007, the Department found that, subject to conditions, Virgin America would be a citizen of the United States and would be fit to engage in interstate scheduled air transportation of persons, property, and mail, and issued to it a certificate

¹ Most of the evidence submitted by Virgin America has been submitted under cover of motions for confidential treatment. As we rely on this material in reaching our decision here, we are issuing this order in two versions: a public version, with discussion of confidential material redacted, and a confidential version that includes all such discussion. The confidential version will be available only to the various parties that have filed appropriate affidavits.

authorizing such transportation, subject to conditions. However, the authority granted by this certificate was not to become effective until Virgin America provided: (1) signed and executed documents and/or agreements satisfactory to the Department, evidencing that the applicant is under the ownership and control of citizens of the United States; (2) a copy of its Air Carrier Certificate and Operations Specifications from the Federal Aviation Administration (“FAA”) authorizing it to engage in such operations; (3) a certificate of insurance evidencing liability insurance coverage meeting the requirements of Part 205 of our rules; (4) updated fitness information describing any changes Virgin America might have undergone subsequent to the show cause order in this proceeding;² and (5) evidence that the applicant continued to have sufficient funding to meet our financial fitness criteria.

On June 27, 2007, Virgin America submitted copies of all signed and executed documents and/or agreements as specified in our Final Order,³ as well as updated fitness information regarding changes in its ownership structure and debt and equity financing,⁴ a copy of its Air Carrier Certificate and Operations Specifications from the FAA, and evidence of its appropriate liability insurance.

Our review of these documents and agreements confirms that Virgin America satisfactorily meets the conditions and that it is owned and under the actual control of U.S. citizens. Under these circumstances, we concluded that there was no reason not to make Virgin America’s authority effective. Thus, on August 7, 2007, we orally advised the applicant that we were making its interstate scheduled certificate authority effective on that date. By this order, we confirm that action and reissue to Virgin America its interstate scheduled passenger certificate to reflect its effective date.

UPDATED FITNESS



² See Order 2007-3-16, issued March 20, 2007.

³ See Appendix A for a list of conditions to Virgin America’s effective authority.

⁴ We discuss the changes the applicant has undergone in more detail in the **UPDATED FITNESS INFORMATION** section of this order.

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REQUEST FOR WAIVER OF 14 CFR § 201.5

On July 5, 2007, the applicant filed a request in Docket OST-2007-28673 for a waiver of the provisions of section 201.5 to the extent necessary to allow it to sell tickets and receive payments. Section 201.5 prohibits a company that has been found fit, but has not yet been issued an effective certificate by the Department, from accepting any payments or issuing tickets for air transportation operations. In support of its request, Virgin America stated that it had completed the FAA's formal safety evaluation in December 2006 and additional validation flights on June 27, 2007, and that the FAA was prepared to issue the company its Part 121 operating certificate.

Based on our review of the application and the updated fitness information provided, we decided to grant Virgin America's request for a waiver. We normally grant such requests when the applicant remains fit, appears likely to obtain its FAA authority before its proposed start-up date, and has put in place mechanisms to protect prospective passenger funds and expectations.

Our primary concern in acting on "pre-sale" requests such as Virgin America's is the protection of consumers and their funds. The applicant had agreed to establish procedures designed to protect its prospective customers. Specifically, the company stated that it would: (1) advise each customer that it does not currently possess full authority to operate the services for which the ticket is being issued and will not have such authority until such time as it is issued by the Department; (2) advise each customer that he or she may obtain a full refund of the purchased ticket price, without penalty, if the customer requests the refund and cancels his or her reservation before Virgin America commences revenue flight operations; (3) place all ticket sales proceeds (from both cash and credit card sales) into an irrevocable escrow account until Virgin America receives effective authority from the Department;¹⁶ and (4) accommodate passengers, who, in their discretion, decline a refund and elect to have Virgin America find substitute air transportation for them, by offering to pay any amount reasonably incurred by the passengers, up to 200 percent of the Virgin America ticket price.¹⁷

In view of Virgin America's acceptance of the consumer-protection conditions we prescribed, its demonstration of continuing fitness, and affirmation from the FAA of the air carrier's satisfactory progress towards certification, we found that it was in the public interest to grant Virgin America's request for a waiver of the pre-operational sales prohibitions of section 201.5 and orally granted the company the waiver it requested on July 11, 2007, which we confirm herein.

ACCORDINGLY, Acting under authority assigned by the Department in its Regulations 14 CFR § 385.12(a)(2):

1. We confirm our oral action of July 11, 2007, granting Virgin America Inc., a waiver of the pre-operational ticket sales prohibitions of 14 CFR § 201.5 to allow it to issue tickets and accept payments from prospective passengers prior to receiving effective Department authority, subject to the conditions described above.
2. We confirm our oral action of August 7, 2007, making the section 41102 interstate scheduled certificate authority issued to Virgin America Inc., effective on that date.
3. We reissue to Virgin America Inc., the interstate scheduled section 41102 certificate issued to it by Order 2007-5-11 in the attached form to reflect its effective date.
4. We direct that, should Virgin America Inc., propose to conduct operations with more than 22 aircraft, it must notify the Department in writing at least 45 days prior to the proposed change in operations and demonstrate its fitness to conduct such operations.

¹⁶ Virgin America submitted a copy of its escrow agreement which we reviewed and found acceptable.

¹⁷ If substitute air transportation could not be obtained, Virgin America agreed that it would pay 200 percent of the ticket price to compensate affected passengers.

5. We direct Virgin America Inc., to submit to the Air Carrier Fitness Division a first year progress report within 45 days following the end of its first year of certificated operations.¹⁸

6. We will serve a copy of this order on all interested parties.

By:

ANDREW B. STEINBERG
Assistant Secretary for Aviation
and International Affairs

*An electronic version of this document is available on the World Wide Web at:
<http://dms.dot.gov>*

¹⁸ The report shall include a description of the carrier's current operations (number and type of aircraft, principal markets served, total number of full-time and part-time employees), a summary of how these operations have changed during the year, a discussion of any changes it anticipates from its current operations during its second year, current financial statements, and a listing of current senior management and key technical personnel.



Certificate of Public Convenience and Necessity for Interstate Air Transportation

This Certifies That

VIRGIN AMERICA INC.

(as reissued)

is authorized, subject to the provisions of Subtitle VII of Title 49 of United States Code, the orders, rules, and regulations issued thereunder, and the attached Terms, Conditions, and Limitations, to engage in interstate air transportation of persons, property, and mail.

This Certificate is not transferable without the approval of the Department of Transportation.

By Direction of the Secretary

*Issued by Order 2007-8-17
On August 17, 2007
Effective on August 7, 2007*

*Andrew B. Steinberg
Assistant Secretary for
Aviation and International Affairs*



Terms, Conditions, and Limitations

VIRGIN AMERICA INC.

is authorized to engage in interstate air transportation of persons, property, and mail between any point in any State, territory, or possession of the United States or the District of Columbia, and any other point in any of those entities.

This authority is subject to the following provisions:

- (1) The holder shall at all times conduct its operations in accordance with the regulations prescribed by the Department of Transportation for the services authorized by this certificate, and with such other reasonable terms, conditions, and limitations as the Department of Transportation may prescribe in the public interest.*
- (2) The holder's authority under this certificate is effective only to the extent that such operations are also authorized by the Federal Aviation Administration (FAA), and comply with all U.S. Government requirements concerning security, including, but not limited to 49 CFR Part 1544.***
- (3) The holder shall at all times remain a "Citizen of the United States" as required by 49 U.S.C. 40102(a)(15).*
- (4) The holder shall maintain in effect liability insurance coverage as required under 14 CFR Part 205. Failure to maintain such insurance coverage will render a certificate ineffective, and this or other failure to comply with the provisions of Subtitle VII of Title 49 of the United States Code or the Department's regulations shall be sufficient grounds to revoke this certificate.*
- (5) The holder is authorized to conduct charter flights in interstate and/or foreign air transportation in accordance with the provisions of 14 CFR Part 212.*
- (6) The holder may reduce or terminate service at any point or between any two points, subject to compliance with the provisions of 49 U.S.C. § 41734 and all orders and regulations issued by the Department of Transportation under that section.*

*** To assure compliance with all applicable U.S. Government requirements concerning security, the holder shall, before commencing any new service (including charter flights) to or from a foreign airport, contact its Principal Security Inspector (PSI) to advise the PSI of its plans and to find out whether the Transportation Security Administration has determined that security is adequate to allow such airport(s) to be served.*

(7) *The holder may not provide scheduled passenger air transportation to or from Dallas (Love Field), Texas, except within the limits set forth in section 29 of the International Air Transportation Competition Act of 1979, as amended or as modified by any future legislation addressing access restrictions to or from Love Field.*

(8) *Should the holder propose any substantial change in its ownership, management, or operations (as defined in 14 CFR § 204.2(l)), it must first comply with the requirements of 14 CFR § 204.5.*

(9) *In the event that the holder commences but subsequently ceases all operations for which it was found “fit, willing and able,” its authority under this certificate shall be suspended under the terms of 14 CFR § 204.7 and the holder may neither recommence nor advertise such operations unless its fitness to do so has been redetermined by the Department. Moreover, if the holder does not resume operations within one year of its cessation, its authority shall be revoked for dormancy.*

CONDITIONS TO VIRGIN AMERICA INC.'S EFFECTIVE AUTHORITY

Virgin America's certificate authority will be made effective when it has submitted in a form satisfactory to DOT:

1. Signed documents demonstrating and certifying that:
 - a. Virgin America has completed its second financial closing.
 - b. Each of its U.S. investor entities has created a separate fund or class of interest that effectively excludes participation by non-U.S. citizens in VAI. This documentation shall include:
 - i. A showing that all non-U.S. investors have been effectively walled off from investing in, and participating in, any proceeds from VAI or Virgin America;
 - ii. Citizenship information for all investors demonstrating compliance with 49 U.S.C. §40102(a)(15);
 - iii. A diagram detailing VAI's ownership structure and information regarding the nationality and percentage of foreign investment in VAI and its owners.
 - c. Virgin America has re-appointed its Board of Directors after VAI restructured its ownership.
 - d. Virgin America has satisfactorily amended its employment contract with Mr. Frederick Reid, the company's Chief Executive Officer ("CEO"), providing for the termination of his employment with the company as CEO within 180 days of the issuance of this order. In the event that Virgin America should decide to retain Mr. Frederick Reid as a consultant for up to three months following his termination as CEO, the applicant will have to provide to the Department a copy of his employment contract that specifically identifies his position and responsibilities as that of a consultant and that specifically limits his term as a consultant to a period not to exceed three months.
2. A copy of all signed and executed documents and/or agreements related to the:
 - a. Reduction of the Virgin Group's representation on Virgin America's Board of Directors.
 - b. Termination of the Virgin Group's special voting powers and its right [REDACTED] including the company's Bylaws and Subscription and Stockholders' Agreements.
 - c. Removal of the following restrictions and covenants included in the Interim Note and Subordinate Note Agreements, the Senior Secured Promissory Notes and the Senior Secured Promissory Notes, Series B, and the Security Agreement:
 - i. Restrictions related to the payment of dividends, the incurrence of senior indebtedness, and the making of a fundamental change to Virgin America's business;

- ii. Restrictions related to the incurrence of certain senior indebtedness, the transfer of certain assets of Virgin America, the maintenance of Virgin America's corporate restriction, and the notification of events or defaults or other defaults; and
 - iii. Covenants related to material Virgin America contracts.
 - d. Issuance of the new Class H Common Stock, including an Amended Stockholders Agreement, an Amended Certificate of Incorporation, and a new Subscription Agreement.
 - e. Additional financing from the Virgin Group and Virgin America's U.S. Investors.
3. A copy of the following signed and executed agreements:
- a. Trademark License Agreement that includes provisions that expressly permit:
 - i. The company to conduct *any* operations (including code sharing), even in direct competition with Virgin Atlantic and without any royalty obligations to the Virgin Group, so long as the company does not use the "Virgin" name in those operations; and
 - ii. Virgin America to conduct operations that use the Virgin mark, *except* in certain limited respects.
 - b. Voting Trust Agreement that will govern the Virgin Group's equity interest in Virgin America that include the following conditions:
 - i. The U.S. members (*i.e.*, the disinterested parties) of Virgin America's Board of Directors must confirm the nomination and the removal of the Voting Trustee;
 - ii. Any change in the Voting Trustee must be reported to the Department; and
 - iii. Should the majority of the Board directors appointed by the U.S. investors determine that the interests of the Virgin Group as a shareholder in a matter subject to shareholder approval potentially conflict with those of the other shareholders, the trustee will vote proportionately to the non-Virgin Group shareholders.
4. The following documents:
- a. A copy of the holder's Air Carrier Certificate and Operations Specifications authorizing such operations from the Federal Aviation Administration (FAA);
 - b. A certificate of insurance on OST Form 6410 evidencing liability insurance coverage meeting the requirements of 14 CFR § 205.5(b) for all of its aircraft;
 - c. A statement of any changes the holder has undergone in its ownership, key personnel, operating plans, financial posture, or compliance history, since the date of the Show Cause Order in this case; and
 - d. A revised list of pre-operating expenses already paid and those remaining to be paid, as well as independent verification that the holder has available to it funds sufficient to cover any remaining pre-operating expenses and to provide a working capital reserve equal to the operating costs that would be incurred in three months of operations.

5. Documentation showing any amendments and the dates these amendments were made to Virgin America's aircraft lease agreements.
6. A sworn certificate that Virgin America's current management, with the exception of Mr. Frederick Reid, has been ratified by the company's non-Virgin Group directors.
7. Evidence that the Virgin Group's stock has been placed in the voting trust.
8. The name, qualifications, compliance history, and citizenship of the Voting Trustee.

OWNERSHIP OF VIRGIN AMERICA

[REDACTED]